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**‘Even children lisp the rights of man’: International Human Rights Law and  
National Minority Jurisdictions**

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**1. Introduction**

This Chapter was prompted by a political fallout between the Supreme Court of the United Kingdom (UKSC) and the Scottish Government shortly after the UKSC began first hearing cases in 2009. It involved an attack by the Scottish government on the London-based court for meddling in domestic Scottish affairs, notably Scottish criminal law, on the grounds that certain aspects of Scottish criminal procedure violated the provisions of the Human Rights Act 1998 (HRA) and were therefore beyond the competence of the Scottish government. Whereas there are many possible readings of the political motivation of the Scottish Government in this particular spat, the incident raises an interesting issue for international human rights law. Taking the Scottish government’s protestations in good faith, this chapter explores whether the position of the Scottish Government can be normatively justified and defended in the practice of human rights law. Emphasising the fact that all human rights norms require some form of ‘domestication’ in their application within national legal systems, it provides a sketch of a normative argument for autonomy in the ‘domestication’ of international human rights norms in national minority institutional structures by drawing upon liberal theories of minority rights and theories of constitutional patriotism. It then assesses whether the autonomy of national minorities in the implementation of international human rights norms can be

accommodated in the extant doctrinal and structural resources of the practice of international human rights law.

## **2. Nonsense in a Kilt?:<sup>1</sup> The Politics of Human Rights Protection**

Since the foundation of the Union between Scotland and England in 1707, the highest court of appeal in the state, the House of Lords (sitting as the Privy Council), has had jurisdiction to hear Scottish civil but not criminal appeals. Whereas there has traditionally been an avenue of appeal to the House of Lords from the Scottish courts in civil matters, criminal cases stopped at the highest court of criminal appeal in Scotland, the High Court of Justiciary (HCJ) in Edinburgh, and there was no way of appealing the decision of that court to London.

The Scotland Act (SA) which established the Scottish Parliament and Government simultaneously restricted their powers by nullifying any act of either body which was beyond the competences bestowed upon them by the Act itself.<sup>2</sup> The Privy Council and subsequently the UKSC, had jurisdiction to definitively determine whether either body acted outside of its competences under the SA.<sup>3</sup> In order to ensure the uniform protection of rights across the UK, the SA provided that any act of the Scottish Parliament or Government which breached the HRA was automatically outwith the competence of the Parliament or Government.<sup>4</sup>

In Scottish criminal procedure, moreover, the Lord Advocate is the head of the prosecution service, and all criminal prosecutions in Scotland take place in their name. However, the Lord Advocate is also an *ex officio* member of the Scottish

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<sup>1</sup> This title is borrowed from C. Himsworth, 'Rights versus Devolution' in T. Campbell, K. Ewing and A. Tomkins, *Sceptical Essays on Human Rights* (OUP, 2001).

<sup>2</sup> S. 29, 54 & 57 SA.

<sup>3</sup> Sch. 6 SA.

<sup>4</sup> s. 29(2)(d) SA.

Government.<sup>5</sup> Therefore all criminal prosecutions, by dint of being brought, formally speaking, by the Lord Advocate, are therefore acts of the Scottish Government and can therefore be challenged before the UKSC on competence grounds which includes the question of whether the conduct of the trial was in conformity with the ECHR, and the right to a fair trial in Art. 6 in particular. The upshot of the combined effects of the SA & HRA, therefore, was to allow the London court to hear criminal appeals in the guise competences challenges for alleged breaches of human rights; something which was unprecedented in the Scottish criminal procedural system since the foundation of the Union in 1707.<sup>6</sup>

Against this background, then, in a brief period of seven months between 2010 and 2011, the newly established UKSC<sup>7</sup> made two important rulings involving human rights and Scottish criminal law; *Cadder v. HMA*<sup>8</sup> and *Frazer v. HMA*.<sup>9</sup> The *Cadder* decision involved a challenge to the practice of police questioning of suspects who were ‘detained’ rather than ‘arrested’ without recourse to legal advice.<sup>10</sup> The Criminal Procedure (Scotland) Act 1995, allowed arrestees to have access to legal advice prior to police interrogation but did not afford the same guarantee to a

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<sup>5</sup> s. 44(1)(c) SA.

<sup>6</sup> The system has now been amended by ss. 36(6) and 34(3) of the Scotland Act 2012 which tightens up the rules on when the UKSC can consider ‘compatibility issues’, including the alleged breach of human rights in criminal trials in Scotland. Under this revised procedure, the UKSC can only determine the compatibility of a criminal prosecution with the HRA before remitting the case back to the HCJ for the case to be concluded. Therefore, future potential breaches of human rights in criminal cases in Scotland no longer result in the proceedings being a nullity, but will rather result in an order of the HCJ if the UKSC confirms that a breach has occurred.

<sup>7</sup> The UK Supreme Court was established by the Constitutional Reform Act 2005 replacing the House of Lords and Privy Council and started work on 1 September 2009.

<sup>8</sup> [2010] UKSC 43.

<sup>9</sup> [2011] UKSC 24.

<sup>10</sup> Scottish criminal procedure has for several decades recognized a form of legal custody short of arrest known as ‘detention’. Ostensibly, detainees, unlike arrestees, are under ‘no legal compulsion’ to go along with the request of police officers (*Swankie v. Milne* 1973 S. L. T. 128), however the precise difference between the two categories has never been entirely clear (see K. Ewing & K. Dale-Risk, *Human Rights in Scotland: Text, Cases and Materials*, (Sweet & Maxwell, 2004), 120). One salient difference between the two categories was the fact that the legal protections for arrestees were stronger than those of detainees in that they had a right of access to legal advice on their arrest, something which was not available to detainees under the old ss. 15 & 17 Criminal Procedure (Scotland) Act 1995. This situation which has now changed in the light of the *Cadder* decision. (see s. 15A Criminal Procedure (Scotland) Act 1995 providing for right to legal advice for detainees).

detainee.<sup>11</sup> The practice had been challenged on a number of occasions after the passing of the HRA,<sup>12</sup> however in *Salduz v. Turkey*<sup>13</sup> in 2008, the European Court of Human Rights (ECtHR) found that the relevant provision of the convention, Art. 6 on the right to fair trial, required that those interviewed by the police should normally have access to legal advice prior to the commencement of police questioning regardless of the legal classification of their detention.<sup>14</sup> In the light of this significant ruling from Strasbourg, the practice of depriving legal advice to detainees was again challenged in Scotland in *HMA v. McLean* 2010,<sup>15</sup> where a full bench of the HCJ in Edinburgh found, notwithstanding the ECtHR's ruling two years previously, that the practice was still compatible with Art. 6 ECHR based on the fact that Scottish criminal procedure offered alternative guarantees to detainees. A challenge was taken shortly thereafter to the UKSC and in a unanimous decision and using particularly reproving language,<sup>16</sup> the Court overruled the decision of the full bench of the HCJ on the issue, finding that the practice of allowing police questioning of suspects to take place without access to legal advice in Scotland was a clear breach of Art. 6 in the light of the *Salduz* decision, and was therefore incompatible with the HRA and therefore that criminal trials which introduced evidence from detainees without legal advice were outwith the competence of the Lord Advocate and therefore a nullity.

The second decision, *Frazer v. HMA*, involved the quashing of a high-profile murder conviction based on the fact that significant evidence had been withheld during the trial. The defendant had been found guilty of murdering his wife in 2003

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<sup>11</sup> ss. 15 & 17 CP(S)A 1995.

<sup>12</sup> *Paton v. Richie* 2000 SLT 239, *Dickson v. HMA* 2001 JC 203.

<sup>13</sup> *Salduz v. Turkey* 36391/02 [2008] ECHR 1542.

<sup>14</sup> *Ibid.*

<sup>15</sup> 2010 SLT 73.

<sup>16</sup> For example, Lord Hope giving the leading judgment (and one of the two Scottish justices on the court) stated that 'It was remarkable that, until quite recently, nobody thought that there was anything wrong with this procedure [of denying legal advice to detainees]', para. 4

and appealed his conviction. During the appeal, it emerged that a significant piece of evidence had been excluded from the trial involving the witness statements of two police officers involved in investigating the murder. The HCJ was, however, satisfied that there was enough evidence for conviction even in the absence of the withheld evidence.<sup>17</sup> Again, the decision of the highest court of criminal appeal in Scotland was circumvented when the UKSC accepted jurisdiction to hear the defendant's allegation that the trial breached his fundamental rights. Looking at the substance of the case the Court found that the evidence that was withheld 'had such an obvious bearing on a crucial part of the circumstantial case'<sup>18</sup> against the defendant such that the failure of the prosecution to give the evidence to the defence was a breach of the defendant's right to a fair trial under Article 6 ECHR and, to much consternation in Scotland given the widespread media and public interest in the case, remanded the case to the Scottish Courts again to retry the case or quash the conviction.

The combined effect of these two rulings from the London-based Court caused a political storm in Scotland where the ruling Party in the Scottish Parliament, the Scottish National Party, unleashed a series of attacks on the Supreme Court for meddling in domestic Scottish affairs. Justice Secretary Kenny MacAskill railed against the 'ambulance-chasing'<sup>19</sup> Supreme Court, claiming that Scotland's distinct legal system had served the country well for hundreds of years 'ensuring justice for victims while also protecting the rights of those accused of crime'<sup>20</sup> and darkly hinted that such rulings may result in the Scottish government cutting its share of funding for

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<sup>17</sup> [2008] HCJAC 26, 2008 SCCR 407.

<sup>18</sup> Lord Hope, para. 2.

<sup>19</sup> 'MacAskill threat to end Supreme Court funding', Herald Scotland, 1 June 2011.

<sup>20</sup> 'Scottish government moves against UK Supreme Court' 29 May 2011, BBCNews online.

the UKSC. The core of his ire, was revealed in his comments in one particular interview where he stated that:<sup>21</sup>

‘We just want to be treated the same as other legal systems – we’re not, because we’re undermined routinely by a court that sits *in another country* and is presided over by a majority of judges *who have no knowledge of Scots law*, never mind Scotland .... [*on the issue of the protection of human rights*] We’ll do so *through our own courts at our own pace in our own way*, not have it imposed by a court in London that is made up of a majority of judges who do not know Scots Law, who may have visited here for the Edinburgh Festival.’

The First Minister Alex Salmond attacked both the Court as well as lawyers who were taking human rights cases before it. As with the Justice Secretary, the basic issue for Salmond was that ‘Scotland has, for hundreds of years, been a distinct criminal jurisdiction, and the High Court of Justiciary should be the final arbiter of criminal cases in Scotland.’<sup>22</sup> Salmond claimed that Scotland didn’t need a supreme court which ‘by definition’<sup>23</sup> comprised of judges ‘*whose familiarity with Scottish legal procedures is inexact at best*’<sup>24</sup>, and were ‘poking [their] nose’<sup>25</sup> in Scottish criminal matters. No other country, in Europe, according to Salmond, had ‘two ‘*foreign*’ appeal courts’<sup>26</sup> overseeing its legal system.

Whereas it is true that there was a heavily strategic dimension to these attacks – the primary political goal of the SNP government, the holding of a referendum on Scottish independence eventually held in September 2014, was at the time of the

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<sup>21</sup> ‘MacAskill in new attack on Supreme Court rulings’, *Herald Scotland*, 31 May 2011. *Emphasis Added*.

<sup>22</sup> ‘Supreme Court threat to Scots Law’ *The Scotsman*, 26 May 2011.

<sup>23</sup> ‘MacAskill in new attack on Supreme court rulings.’, *Herald Scotland*, 31 May 2011.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> ‘Alex Salmond provokes fury with attack on UK Supreme court’, *The Guardian*, 1 June 2011. *Emphasis Added*.

decisions, far from a certainty - the debacle does raise an interesting issue for international human rights law. The issue was directly posed by the intervention of the Advocate General for Scotland in the controversy when he asked ‘Why should Scots not have their human rights protected in the same way as people in the rest of the UK?’<sup>27</sup>

This chapter is an attempt to probe this question by exploring whether the theory and practice of human rights law can support the claims of the Justice Secretary and First Minister. In doing so, it is important, at the outset, to distinguish the aims of this chapter from other areas of human rights law and practice involving national minorities. In particular this chapter is not, or at least not directly, a contribution to debates about the right to self-determination of national minorities nor a contribution to the field of the human rights of indigenous peoples.<sup>28</sup> Nor is it an attempt to explore the liability of states under international human rights law for sub state entities or regions over which they have some influence or ‘effective control’.<sup>29</sup> Rather, the issue raised by these events relate to a distinct question in international human rights law; that is whether national minorities can or should have some discretion, or be afforded a certain margin of appreciation, in the giving effect to international human rights norms vis-à-vis the metropole.

### **3. Human Rights and the Constitutional Identity of National Minorities**

On some levels the political controversy sparked by the UKSC’s rulings seems like a rather odd dispute. Aside from the problematic logic of the Justice Secretary

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<sup>27</sup> ‘Alex Salmond provokes fury with attack on UK Supreme Court’ *The Guardian*, 1 June 2011.

<sup>28</sup> See generally, D. Thurer and T. Burri, ‘Self-Determination’ in *Max Planck Encyclopaedia of Public International Law*, (OUP, 2008).

<sup>29</sup> See for example, the Cases of *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 28-183, ECHR 2004-VII and *Catan v. Moldova and Russia*, App. Nos, 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012.



and First Ministers' statements regarding 'foreign judges' with no knowledge of Scots law – the two leading opinions in *Cadder* and *Frazer* were given by Scottish judges - and the patent lack of more qualified judges (at least from the perspective of familiarity and expertise in Scots law) in Strasbourg, the subject matter of the dispute, human rights, is one which is usually considered to transcend boundaries, whether subnational or national, applying equally to all individuals, regardless of their nationality or political status.<sup>30</sup> The 'borderless' dimension of human rights is explicitly recognised by Article 2(2) of the cornerstone of the 'international Bill of rights', the Universal Declaration of Human Rights, which provides that, in the protection of the rights contained in the declaration, 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country of territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.' Therefore to claim some sort of special pleading, or particularity, in the application of international human rights standards such as those contained in the ECHR, for one corner of a Western liberal democracy seems to question that corner's commitments to Western liberal democracy and contradict the fundamentally universal character of international human rights law.

Thus, at first blush it would seem that the Advocate General's question, as to why Scots should have their human rights protected differently from other UK citizens, should be answered in the negative; that there is no reason, given the universality of human rights norms, that Scots should have their human rights

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<sup>30</sup> See for example Articles 1 & 2 of the Universal Declaration of Human Rights. Article 1 states that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2, 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

protected any differently than anyone else in the UK or indeed Europe, or the world. However, viewing the question from the other perspective, that of the global level, reveals that things may not be so straightforward. Universal human rights norms necessarily entail a particular dimension whereby the universal and open-textured provisions of international human rights law require some ‘contextualization’ within different regional and political settings. This particularistic dimension of international or regional human rights norms does not, or at least not only, relate to the trivial point that all norms need to be applied to particular facts, such that all human rights norms have to be particularized in some sense to the circumstances of their application (does waterboarding constitute torture?, should racists statements be protected under the freedom of expression? etc.).<sup>31</sup> Rather, the particular dimension of international human rights norms involves a recognition that precisely because of their universal character, that human rights law applies to (sometimes radically) different social, historical, ethnic, cultural, developmental, religious and political contexts. For these reasons, Carozza argues that the very *idea* of universal human rights standards, entails an ‘affirmation of a degree of pluralism and diversity in [global] society’<sup>32</sup> which ‘recognises and protects our capacity to pursue the good [...] by a plurality of paths.’<sup>33</sup> The evolution of human rights regimes in the post-war era has, therefore, involved increased ‘norm specification’<sup>34</sup> where ‘normative openness and underdetermination’<sup>35</sup> characterise the terrain of international human rights law which results in a broad degree of ‘interpretative latitude’<sup>36</sup> in the implementation of those

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<sup>31</sup> N. Walker, ‘Universalism and Particularism in Human Rights’ in C. Holder & D. Reidy (eds.), *Human Rights: The Hard Questions* (CUP, 2013), p. 42.

<sup>32</sup> P Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights law’ (2003) 97 *American Journal of International Law* 38–79, 47. (hereinafter Carozza ‘Subsidiarity’)

<sup>33</sup> Carozza ‘Subsidiarity’, 47.

<sup>34</sup> Carozza ‘Subsidiarity’, 59.

<sup>35</sup> Carozza ‘Subsidiarity’, 60.

<sup>36</sup> Carozza ‘Subsidiarity’, 60.

norms. The implementation, interpretation and application of human rights norms, then, involves ‘an exercise of *creative freedom* to legislate in different ways that may be equally consistent with the basic requirements of the common good.’<sup>37</sup> Thus, even if the principles or values of human rights law are universal, their instantiation in particular legal orders can and do differ from context to context. Rather than constituting a ‘covering universalism’, then, human rights law can be said to be ‘*relatively*’<sup>38</sup> rather than *absolutely* determinate of ‘appropriate conduct in their domain of application’.<sup>39</sup> For Carozza, this interpretative discretion best characterises the development of international human rights law in the post-war era.<sup>40</sup>

This particularistic dimension of human rights law has been central to the ECtHR’s interpretation and application of the rights contained in the ECHR. From its earliest decisions, one common feature of the Court’s approach has been to stress the subsidiary nature of the Court’s protection of the rights contained in the Convention and the primary responsibility of signatory states to implement and give effect to the rights contained in the Convention.<sup>41</sup> It is, the Court has repeatedly stressed, for states, in the first instance to implement and apply the rights of the convention according to their relevant domestic requirements.<sup>42</sup> Two aspects of the Court’s practice reveal this particularistic dimension of human rights; the margin of appreciation doctrine and the lack of uniform implementation of the Convention in domestic law.

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<sup>37</sup> Carozza ‘Subsidiarity’, 72.

<sup>38</sup> Neil Walker, ‘Universalism and particularism in human rights’, 43.

<sup>39</sup> *Ibid.*

<sup>40</sup> ‘[D]espite all of the normative developments of international human rights law over the last half century, it is still characterized less by fully articulated normative content than by the interpretative discretion that it leaves to states through the open-ended nature of its language, the legal doctrines supporting it, and the political context of the culturally pluralistic world to which it is intended to apply.’ Carozza ‘Subsidiarity’ 62.

<sup>41</sup> *Sadik v. Greece*, 24 EHRR (1996) 323, 399.

<sup>42</sup> Judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no. 6, p. 35, para. 10 in fine.

The margin of appreciation doctrine where the Court defers under certain conditions to the domestic authorities' appraisal of facts, decision-making procedures and interpretation of national law and mores, present from the Court's earliest decisions, clearly demonstrate this necessarily particularistic dimension of human rights law. For example, in an early seminal decision, *Handyside v. UK*,<sup>43</sup> the Court explicitly recognised that human rights could not be accommodated in precisely the same way in the different jurisdictions in Europe due to the pluralism which prevailed, even in a relatively homogenous region such as Western Europe, with regard to the meaning of public morals.<sup>44</sup> It was therefore, the Court concluded, for national authorities and institutions to interpret and apply the relevant provisions of the convention in a manner best suited to their national sensibilities.<sup>45</sup> This 'margin of appreciation'<sup>46</sup> applied, not only to judicial authorities but also to the 'domestic legislator and [other] bodies [...] that are called upon to interpret and apply the laws in force'.<sup>47</sup>

Furthermore, notwithstanding the Court's insistence on the primary role of states in implementing and giving effect to the Convention, it has never insisted on how, precisely, the rights contained in the ECHR should be implemented in national law whether through formal incorporation, or the prescription of remedies for violation. With regard to the question of formal incorporation, in its early cases the Court explicitly refused to interpret Art. 13 ECHR requiring national authorities to provide an 'effective remedy' for rights violations, as a general obligation to

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<sup>43</sup> *Handyside v. UK* (5493/72) [1976] ECHR 5 (7 December 1976).

<sup>44</sup> *Handyside v. UK* (5493/72) [1976] ECHR 5 (7 December 1976).

<sup>45</sup> *Handyside*, para. 48.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

incorporate the convention into domestic law.<sup>48</sup> Moreover, in respect of prescribing remedies for human rights violations under the Convention, the Court has maintained that it is not competent to make recommendations on how States should or could better comply with the Convention by prescribing institutional, administrative or legal reform. It has generally limited itself to providing ‘just satisfaction’ for victims where national law failed to provide full reparation.<sup>49</sup>

Thus, the notion that international human rights norms necessitate a degree of calibration and domestication into domestic legal systems and political contexts is a commonplace in international human rights law, particularly European human rights law. This being the case, then, the question then emerges for states with internally differentiated levels of government such as federal states or complex asymmetrically governed states such as the U.K, Spain or Belgium, as to what the appropriate level for this accommodation or ‘domestication’ is. That there can be some variation in human rights standards even within a single state is not unusual. As the UK Parliament’s Joint Committee for Human Rights’ Report on a Bill of Rights for the UK noted:

‘It is common for federated states, such as Canada, the US and Germany, to have both federal Bills of rights and state-level Bills of Rights, and for any questions

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<sup>48</sup> See *Silver v. UK*, ECtHR, Series A No. 61 (1983), para. 113; *Swedish Engine Driver’s Union v. Sweden*, ECtHR, Series A No. 20 (1984), para. 50

<sup>49</sup> L. Hefler, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19(1) *EJIL* 125-159, 146). Admittedly, the Court has been more prescriptive in recent years, making recommendations to remedy systemic deficiencies in national law through the practice of ‘pilot judgements’ targeted at specific signatory states. ( See *Broniowski v. Poland 2002-X*; 40 *EHRR* 21) However, even here, such recommendations are made with the cooperation of, and in conjunction with, national authorities. See generally, W. Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’ [2009] 9:3 *Human Rights Law Review* 397-453..

about the hierarchical relationship between these different levels of rights protection to be resolved by the federation's Constitutional Court.' <sup>50</sup>

Furthermore, on the implementation of international human rights standards, the Committee noted in respect of internally differentiated states, that:

'Ever since the Universal Declaration of Human Rights, human rights norms have gradually become embedded at global, regional and national level. Provided the hierarchy between these levels is clear, there is a positive virtue in the broadly defined rights in the international standards *being fleshed out into more concrete norms and standards at the regional, national and sub-national level.*'

Thus, the notion that different levels of government within a single state may have distinct human rights jurisdiction is an unremarkable feature of many internally differentiated states. However, as the opinion of the committee for a Bill of Rights notes, such sub-national jurisdictions remain subject to their 'correction' by the national or metropolitan level thereby ensuring uniformity of standards across the various levels of government within the state itself, just as the UKSC appeared to do in *Cadder* and *Frazer*.<sup>51</sup> However, the notion of the autonomy of subnational minorities in implementing and applying international human rights norms implicit in the comments from the First Minister and the Justice Secretary, goes beyond this. They call for the explicit recognition and respect by metropolitan apex courts of the subnational minority's choices on how to implement and protect human rights norms within their particular systems.

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<sup>50</sup> *A Bill of Rights for the UK?* (2007-8) HL 165, HC 150, vol I, Ch. 3 Para. 107.

<sup>51</sup> I say 'appeared' because shortly before *Cadder* was decided, the UKSC decided a case involving English and Welsh criminal law where it defied Strasbourg and upheld the practices of English and Welsh criminal procedure notwithstanding the fact that according to the Strasbourg Court, such practices were in breach of Art. 6 ECHR. (*R v. Horncastle* [2009] UKSC 14). Thus, it is not entirely clear, in the light of this decision, whether the UKSC is, in fact, maintaining a uniform ECHR compatible standard of human rights protection across the UK or whether the biggest criminal jurisdiction in the state, England and Wales, has more autonomy than Scotland or Northern Ireland to diverge from the ECtHR's rulings.

Thus the fact of internal differentiation alone does not necessarily lead to the respect and recognition of sub-state autonomy in interpreting and applying international human rights norms such as the HCJ's opinions on the meaning and requirements of a right to a fair trial in questions of access to legal advice and the withholding of particular evidence forming the basis of the appeals in *Cadder* and *Frazer*. Rather, an independent normative argument is required to substantiate the positions taken by the Justice Secretary and First Minister. Such normative reasons can be found, it is submitted by drawing on a liberal theory of minority rights and the theory of constitutional patriotism.

*Normativizing the autonomy of national minorities in the implementation of human rights*

Kymlicka's well-known liberal theory of national minorities provides one resource to provide normative arguments as to why national apex courts should recognise and respect the autonomy of national minorities in domesticating international human rights standards. It departs from the notion of a 'societal culture' which can be differentiated from other types of group cultures such as religious or social groups in that it provides its members 'with meaningful ways of life across the *full range* of human activities, including social, educational, religious, recreational, and economic life, encompassing *both* public and private spheres'.<sup>52</sup> As such societal cultures 'are important to people's freedom'<sup>53</sup> where such freedom involves 'making choices amongst *various options*'<sup>54</sup> determining the 'boundaries of the imaginable'.<sup>55</sup> The societal culture 'not only provides these options'<sup>56</sup> but also, significantly, 'makes

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<sup>52</sup> W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP: 1996), 76. (hereinafter 'Multicultural Citizenship').

<sup>53</sup> Multicultural Citizenship, 80.

<sup>54</sup> Multicultural Citizenship 89.

<sup>55</sup> Multicultural Citizenship 89.

<sup>56</sup> Multicultural Citizenship 83.

them meaningful to us.’<sup>57</sup> As such, culture ‘provides the receptacle through which we identify our experiences as valuable’<sup>58</sup> where cultural narratives are a ‘precondition of making intelligent judgments about how to lead our lives.’<sup>59</sup> Significantly for Kymlicka, societal cultures are usually territorially based and share not just language, memories and values but also ‘common institutions and practices.’<sup>60</sup>

Combining the fact that human rights norms require some domestic accommodation with the freedom of ‘cultural societies’, it is argued, can provide normative support for the autonomy of national minorities in the implementation and application of human rights norms which can create demands for recognition of this autonomy by the metropole. If, as Kymlicka suggests, a societal culture provides options across the ‘full range of human activities’ then this necessarily involves and includes questions about the freedom to choose different paths to the good life which human rights norms, and the diversity in their accommodation, necessarily presupposes. In this respect, the ‘meaningful options’<sup>61</sup> about questions of freedom and how to live one’s life dovetail with Carozza’s assertion that the international human rights system entails the ‘*creative freedom*’<sup>62</sup> to domesticate the abstract and open-textured values in different ways which are consistent with the ‘basic requirements of the common good.’<sup>63</sup> As such the freedom of cultural societies can be said to involve the ‘freedom of individuals and communities to seek the goods necessary for a dignified human life’<sup>64</sup> implicit in the idea of international human rights law. If the latitude to implement and apply human rights norms really is a

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<sup>57</sup> Multicultural Citizenship 83.

<sup>58</sup> Dworkin cited by Kymlicka, Multicultural Citizenship 83.

<sup>59</sup> Multicultural Citizenship, 83.

<sup>60</sup> Ibid.

<sup>61</sup> Multicultural Citizenship, 83.

<sup>62</sup> Carozza, ‘Subsidiarity’ 72.

<sup>63</sup> Ibid.

<sup>64</sup> Carozza, ‘Subsidiarity’ , 47.



function of the value of liberty as Carozza suggests, and this is an endemic feature of international human rights law in the post-war period, then viewed from the perspective of the freedom of cultural societies, it could be argued that contemporary international human rights law *requires* a measure of autonomy and respect from the metropole in domesticating human rights norms within that particular societal culture.

Furthermore, the domestication of universal human rights norms within a particular societal culture, and the freedom, identity and self-determination of that culture can be mutually constitutive, as suggested by the idea of constitutional patriotism. Müller defines constitutional patriotism as providing ‘one possible language for an exercise in collective ethical self-clarification’,<sup>65</sup> involving ‘bounded political associations’<sup>66</sup> who have ‘an attachment to universal values, which is then realised in a particular political setting.’<sup>67</sup>

Significantly, the object of attachment in constitutional patriotism relates to the ‘universal moral norms’<sup>68</sup> embedded in ‘particular procedures that structure the rules for reworking a constitutional culture.’<sup>69</sup> It is from disagreements about what these universal moral norms require within particular contexts that a ‘constitutional *identity*’ or ‘constitutional culture’ emerges.<sup>70</sup> In this regard, Müller recalls the Habermassian distinction between the ethical and the moral realm, whereby in the ethical realm collectives ‘reach an understanding of who they would like to be and which of their traditions they should continue or modify in the light of moral discourses’<sup>71</sup> and the realm of morality aims at ‘finding rules and decisions that are

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<sup>65</sup> J.-W. Müller, ‘A general theory of constitutional patriotism’ (2008) 6 International Journal of Constitutional Law 72–95, 77. (hereinafter Müller ‘General theory’)

<sup>66</sup> *Ibid.*, 78.

<sup>67</sup> Müller, ‘General Theory’, 73.

<sup>68</sup> Müller, ‘General Theory’, 82.

<sup>69</sup> *Ibid.*

<sup>70</sup> Müller, ‘General Theory’, 80.

<sup>71</sup> Müller, ‘General Theory’ 83.

rationally acceptable to all affected by the rules.’<sup>72</sup> However, in practice given that ‘questions about universal rights and collective identities cannot easily be disentangled in practical political debate’<sup>73</sup>, the boundaries between the ethical and the moral realms can be collapsed such that the act of self-definition becomes part and parcel of finding rules and decisions that are universally morally acceptable. Viewed in this light, then, the question of the ethical-clarification of political communities, in negotiating and disagreeing about the meaning and requirements of universal morality within particular cultural contexts overlaps considerably with the ‘domestication’ of international human rights norms in national minority contexts considered above. In negotiating and determining what universal norms such as the right to a fair trial or freedom of expression require in the context of a particular societal culture, the political and constitutional identity of that particular societal culture can be said to be given further definition along constitutional patriotic lines. Thus, as well as providing reasons for the autonomy of societal cultures in implementing human rights norms, constitutional patriotism shows how the very act of accommodating and domesticating international human rights norms by national minorities underpins and constitutes an expression of the identity of that societal culture *qua* political community. Given the link between the accommodation of human rights norms and cultural freedom, then, it can be seen how the autonomy of national minorities in accommodating and giving expression to human rights norms can, in itself, constitute a form of constitutional patriotism.<sup>74</sup>

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<sup>72</sup> Müller, ‘General Theory’, 83.

<sup>73</sup> Müller, ‘General Theory’ 84.

<sup>74</sup> Using Müller’s account of Constitutional Patriotism in this way, constitutes a departure from the contexts within which Müller himself envisages that constitutional patriotism can apply. He is clear that constitutional patriotism cannot provide leverage for the formation of political communities in the form of, for example, the independence of extant substate national minorities. Constitutional Patriotism is not, therefore, a ‘freestanding theory of political boundary formation’ (5) and as such cannot ‘answer questions about political self-determination’(5) for potential political communities that do not already enjoy constitutional and institutional infrastructures. However, this objection can be

#### 4. Methods of Management

The practice of International Human Rights law contains a number of resources that can potentially give expression to the normative argument for the autonomy of national minorities in the application of international human rights norms. Three aspects of the contemporary practice of international human rights in particular can potentially serve this purpose; human rights exceptionalism, subsidiarity and pluralism.

##### *1) Human Rights Exceptionalism*

Human Rights exceptionalism is a political or judicial attitude to international human rights law genetically linked to ideas of sovereignty and self-determination. Writing in the US context, Ignatieff identifies three forms of human rights exceptionalism; the non-ratification of human rights treaties, the insertion of reservations to treaties or non-compliance with ratified treaties; double-standards in criticizing friends and enemies for human rights violations in foreign policy; and denying human rights norms any effect in domestic law.<sup>75</sup> Given that a large part of the explanation of US exceptionalism with respect to international human rights standards has to do with its sheer size and economic and political influence as the world's only 'hyperpower'<sup>76</sup>, of the three dimensions of exceptionalism identified by Ignatieff, it is the third form, denying international human rights norms effect in domestic law, which is of relevance to the question of the autonomy of national minorities in relation to

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overcome, it is submitted, by founding the constitutional patriotism of subnational minorities on the freedom of existing national minorities which can do the relevant, and necessary work, to delimit or define the boundaries of subnational minorities *qua* political communities in order for constitutional patriotism to apply.

<sup>75</sup> M. Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2005), 6-8.

<sup>76</sup> Ignatieff, 12.

universal human rights standards. This form of human rights exceptionalism involves subnational minority courts taking an ‘exceptional’ attitude to international human rights law by refusing to recognise them as valid law, refusing to apply them, subordinating them to overriding provisions of domestic law or interpreting them in such a way as to deny them any real effect. The public face of this form of exceptionalism in the US is Justice Antonin Scalia of the US Supreme Court,<sup>77</sup> however Scotland also has a figurehead for human rights exceptionalism in the figure of Lord McCluskey, a former judge of the Scottish Supreme Courts. In the face of rising demands for the domestic implementation of the ECHR in the UK, McCluskey used the occasion of the delivery of the BBC’s Reith Lectures in 1986 to denounce the idea of universal human rights standards and their codification in Scotland, famously predicting that domestic incorporation of the ECHR would be ‘a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers.’<sup>78</sup> He reprised these remarks in a series of Articles in Scottish newspapers in 2000 shortly after the Human Rights Act 1998 came into force in Scotland arguing that the immediate effect of litigants ‘claiming their new ‘European’ rights’<sup>79</sup> had been ‘devastating’<sup>80</sup>. He also denounced the fact that the ECtHR contained judges from foreign countries who would be adjudicating on Scottish matters. This series of comments led to his being recused from a criminal trial in which the defendants had based part of their defence on ECHR provisions in the case of *Hoekstra v. HMA (No. 1)*.<sup>81</sup> On appeal, the defendants argued that McCluskey’s extra-curial remarks meant that the trial was tainted by bias given that they were pleading provisions of the HRA as part of their defence. In a hearing on whether the bench should be reconfigured for

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<sup>77</sup> *Printz v. US* 521 U.S. 898, 921 n. 11 (1997).

<sup>78</sup> Published as McCluskey, *Law, Justice and Democracy*, (London: Sweet & Maxwell, 1987).

<sup>79</sup> *Ibid.*

<sup>80</sup> Scotland on Sunday, 6 February 2000.

<sup>81</sup> 2000 S.C.C.R. 263.

the continuation of the case, the HCJ agreed and ordered a rehearing of the parts of the trial. The exceptionalist nature of McCluskey's position on the role of international human rights norms in Scottish courts was well summarized by the Court during this hearing and it is therefore worth quoting at length. They noted that:<sup>82</sup>

'by likening the introduction of the Convention into Scots law to the introduction of a Trojan Horse, in the shape of a revolutionary instrument for change, Lord McCluskey was conjuring up the picture of a deceitful stratagem being used to introduce into the citadel of Scots law an alien force which would attack the defending soldiers. There was an implicit suggestion that this alien force would be introducing a revolution which would change the established and better ways of the native Scots law. The immediate results of the introduction of the Convention in Scotland had been "devastating"—implying that it had laid waste areas of national law. Whether one thought of the *Titanic* sailing towards a legal iceberg or the approach of an avalanche in which the Scottish courts would have to struggle to avoid being buried in the new claims of right, the imagery was overwhelmingly negative and painted a picture of the Convention as something which threatened danger to the Scottish legal system."

Thus, human rights exceptionalism has taken root in Scotland and could provide a possible basis for the autonomy of national minorities in implementing international human rights norms. However, even if this is the case it is not a particularly attractive way of doing so. As a political or judicial attitude, rather than legal doctrine of international human rights law, exceptionalism is unsuited to managing the domestication of international human rights standards at national minority level. Rather than good faith engagement with the international human rights standards as

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<sup>82</sup> *Hoekstra v. H. M. Advocate* (No. 3), 2000 SLT 605, [2000] H.R.L.R. 410.

part of the on-going constitution of the political identity of national minorities, human rights exceptionalism constitutes a rejection or subordination of human rights standards to a domestic constitutional chauvinism more relevant to the darker legacies of nationalism than the normative freedom of cultural societies. As such, it does not achieve the ideals of the normative theory outlined above whereby national minorities engage with and take seriously the universal standards set by international human rights norms.

## 2) *Subsidiarity*

Subsidiarity is becoming an increasingly prominent feature of the international human rights landscape.<sup>83</sup> The concept itself, has, in recent times, found its clearest expression in the EU context but has since spread to other mechanisms and institutions of supranational governance.<sup>84</sup> At its root, subsidiarity provides a ‘conceptual and rhetorical mediator between supranational harmonisation and unity, on the one hand, and local pluralism and difference on the other.’<sup>85</sup> The kernel of the idea of subsidiarity, then is the idea that in a distribution of levels of decision-making, decisions should be taken as close as possible to the individual within a particular social context.

Neumann identifies four features of the structure of international human rights law which encapsulates the ideals of subsidiarity in terms of the appropriate level of decision-making; the exhaustion of domestic remedies requirement, the ‘fourth

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<sup>83</sup> For example, Protocol 15 to the ECHR of the 24 September 2013 makes an explicit reference to the concept to be inserted in one of the recitals of the Preamble of Convention itself on ratification.

<sup>84</sup> See generally Carozza, ‘Subsidiarity’.

<sup>85</sup> Carozza, ‘Subsidiarity’, 54.

instance' formula, remedial subsidiarity and the margin of appreciation.<sup>86</sup> The exhaustion of domestic remedies is perhaps the clearest expression of subsidiarity in international human rights law in its insistence that states are the principal site of resolution of complaints of human rights violations and has become a standard procedural mechanism for many supranational adjudicatory bodies.<sup>87</sup> The 'fourth instance' doctrine relates to the idea that supranational courts, not least Human rights adjudicatory bodies, should not act as a forum of fourth instance on a particular dispute; their proper role is simply to assess whether the claimed action violates the particular human rights standards established in the international agreement signed by the relevant state.<sup>88</sup> Remedial subsidiarity relates to the notion that it is for states, and states alone to determine what the appropriate remedy for a human rights violation is and the margin of appreciation, discussed above in relation to the ECHR, relates to supranational courts deference under certain conditions to the domestic authorities' appraisal of facts, decision-making procedures and interpretation of national law and mores.<sup>89</sup>

With its arguably overtly political or at least principled character, it would appear that subsidiarity would be a particularly useful mechanism to manage the tension between universality and particularity in respect of human rights adjudication by national minorities. Its emphasis on taking decisions about the nature, meaning and implementation of human rights norms as close as possible to the individual in their most relevant social context<sup>90</sup> resonates strongly with the ideals of the liberty of cultural societies. However, two features of subsidiarity in international human

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<sup>86</sup> G. Neman, 'Subsidiarity' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, (OUP, 2013), pp. 369-377.

<sup>87</sup> Neuman 'Subsidiarity', 369-70.

<sup>88</sup> Neuman 'Subsidiarity' p. 370-71.

<sup>89</sup> Neuman, 'Subsidiarity' p. 371-374.

<sup>90</sup> See Carozza, 'Subsidiarity' p 46.

rights law both conceptually and in practice create doubts as to whether it is suitable to vindicate the interpretative autonomy of national minorities in implementing international human rights norms. Firstly, the aims of subsidiarity as it has emerged both in catholic social doctrine as well as in political theory relate to social groupings such as trades unions, community groups or religions organisations rather than the Kymlickan notion of 'cultural society'. As much is clear from Neuman's identification of certain international human rights norms as encapsulating the ideals of subsidiarity such as the right to freedom of association and the right to family life.<sup>91</sup> However, as noted above, cultural societies differ from generic social groups in providing their members with meaningful ways of life across the '*full range* of human activities'<sup>92</sup> crystallizing in common institutions and practices and not mere interest-based social association. Secondly, whereas in theory subsidiarity appears to be an optimal way of managing the tension between human rights universality and the specificity of national minorities, in international human rights law practice it has tended to rely on a rigid understanding of the 'westphalian paradigm' of sovereign states. As such, subsidiarity stops at the state level and serves merely to adjudicate and operate between two levels, national and international, oblivious to the question of whether national minorities should have a stake in the implementation of human rights norms. As Neumann notes in this regard:<sup>93</sup>

‘ ... international human rights law does not currently provide strong support for a requirement of *territorial subsidiarity within the state*, as a claim for federalism or local government ... *The principal human rights treaties do not give local governments autonomy rights against regions or states, or require that the larger unit refrain from regulating matters that the local governments could address.* ‘

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<sup>91</sup> Neuman, 'Subsidiarity', 366.

<sup>92</sup> 'Multicultural Citizenship', 76.

<sup>93</sup> Neumann, 'Subsidiarity', 368, *Emphasis Added*.



While a step in the right direction, then, subsidiarity provides cold comfort for national minorities with aspirations of implementing and contextualizing international human rights norms according to their own cultural orientation as a facet of their own freedom as a cultural society. However, building on the ideals of subsidiarity, a more recent trend in human rights law is, it is claimed, up to the task and can provide a more appropriate vehicle for the vindication of national minority autonomy in the domestic accommodation of international human rights standards; that is the idea of pluralism.

### 3) *Pluralism.*

The field of legal and constitutional pluralism in respect of the interaction and conflicts between legal orders in the contemporary world is an increasingly broad field with diverse interests and normative commitments.<sup>94</sup> Notwithstanding such diversity, however a number of features can be distilled from the increasingly diverse models and defences of pluralism advanced in academic scholarship on the subject. Perhaps the most significant feature shared by all pluralists, which is of particular relevance to the question being considered here, is the sense in which the ‘Westphalian paradigm’ of territorial state sovereignty and an international system of sovereign states who design the international legal system according to their own ends is, if not quite redundant, certainly being increasingly challenged by the forces of globalization and the proliferation of supranational legal orders with executive, judicial and legislative functions with concomitant claims to autonomy and original jurisdiction. The fortification of supranational law and governance such that International law is becoming increasingly constitution-like and constitutional law increasingly imports elements of international law constitutes a particular challenge to

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<sup>94</sup> A literature which is increasing exponentially. For a recent collection on the current state of the debate see M. Avbelj & J. Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012).

understanding the legal and political world in terms of a rigid state sovereignty and a dualism of international and constitutional law. Thus, one feature of pluralism in the diverse models and accounts of the idea is that we are in transition to (or have arrived at) a post-Westphalian settlement where state sovereignty is either obsolete as the founder of pluralism, Neil MacCormick argued,<sup>95</sup> or in a state of evolution to a more complex form.<sup>96</sup> Furthermore, pluralism recognises and embraces the considerable blurring of the constitutional and the international and sees the legal and political world in terms of a series of overlapping authorities and sites of governance which operate alongside each other in a heterarchy or polyarchy rather than hierarchy, at times cooperating but also conflicting in a global ‘disorder of legal orders’.<sup>97</sup>

Thus, pluralism is predicated upon a move away from, or evolution of, the rigid Westphalian dichotomy or dualism of international law and constitutional law and envisages authority claims not only from states but other sites at different levels of governance. Given its rejection of a rigid dualism of the Westphalian model, as well as its demotion of state sovereignty as the primary organizing principle of law and politics, pluralism is therefore particularly apt to recognise and accommodate the idea of subnational minority adjudication of international human rights standards.<sup>98</sup> As well as highlighting the significance of supranational governance in the contemporary world, pluralism has the capacity to prize open the lid of the sovereign state and assimilate the complexity and differentiated nature of sub-state governance and authority claims, encapsulating them into a broader tapestry of overlapping

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<sup>95</sup> N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56(1) *MLR* 1-18.

<sup>96</sup> N. Walker, ‘Late Sovereignty in the European Union’ in N. Walker, *Sovereignty in Transition*, (Hart: 2003).

<sup>97</sup> N. Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of normative Orders’ (2008) 6(3-4) *ICON* 373-396.

<sup>98</sup> See generally C. Mac Amhlaigh, ‘Late Sovereignty in Post-Integration Europe: Continuity and Change in a Constitutive Concept’ in R. Adler-Nissen & U. Pram-Grad, *Post-Colonial Sovereignty Games: The Overseas Countries and Territories of the European Union*, (Routledge 2012).

heterarchial or polyarchical authority claims at substate, state and suprastate levels.<sup>99</sup> Furthermore, the emphasis in pluralism on dynamic discursive interaction rather than static assertions of final and absolute authority mean that subnational minorities can make plausible claims to autonomy without having to challenge or assert a Westphalian-style sovereignty in the form of independence.<sup>100</sup> As such pluralism gives agency and voice to subnational minority claims, including at the post-state level in way which the Westphalian system does not.

With respect to the ECHR in particular, pluralism has been used to support the authority claims of the ECtHR in interpreting the rights contained in the Convention, as well as the counter-authority claims from national apex courts.<sup>101</sup> However, as distinct from other forms of regime interaction in a global ‘disorder of legal orders’, human rights law is particularly conducive to pluralism given that it entails a common set of universal values which provide a common point of reference for all interpretative levels whether at the sub-state, state and suprastate levels. In this regard, the ‘suprapositive’<sup>102</sup> values of the rights contained in the ECHR can provide a *framework* allowing for the ‘constructive engagement of different sites of authority with one another.’<sup>103</sup> In this vein, the ECHR can be said to provide this framework, ‘map[ing] onto rights found in national systems [and] undergird[ing] the notion of a

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> See N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71(2) *MLR* 183-216, C. Sabel and O. Gerstenberg, ‘Constitutionalising and Overlapping Consensus: The ECJ and the Emergency of a Coordinate Constitutional Order’ (2010) 16(5) *ELJ* 511-550, S. Greer and L. Wildhaber, ‘Revisiting the Debate and ‘constitutionalising’ the European Court of Human Rights’ (2012) 12(4) *Human Rights Law Review*, 655-687; A. Stone-Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’ (2012) 1(1) *Global Constitutionalism* 53-90.

<sup>102</sup> Neumann, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55(5) *Stanford Law Review* 1863-1900, p. 1868.

<sup>103</sup> M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the States’ in J. Dunoff and J. Trachtman (eds.), *Ruling the World?: Constitutionalism, International Law and Global Governance*, (CUP, 2009), 272.

multi-level constitutionalism’<sup>104</sup> whereby ‘no act taken by any public authority, at any level of governance, can be considered lawful if it violates a fundamental right.’<sup>105</sup> Pluralism, therefore, encapsulates the contestation and disagreement about the meaning and interpretation of these common values as well as the optimal way to secure their protection in diverse political and social environments and at different levels of governance in a post-Westphalian Europe.

Thus, when interpreting the rights contained in the Convention, which are shared by the various legal systems, sub-national courts, national courts and the ECtHR can delve into the same common normative resource of universal values which inform the (positive) provisions of the ECHR. These principles therefore provide the ‘glue’<sup>106</sup> which binds sub-national and national legal orders and the ECtHR system together in a pluralist relationship over and above the positive law provisions of subnational or national constitutional arrangements or the Convention itself.<sup>107</sup> In terms of the autonomy of national minorities in the implementation of international human rights standards, then, pluralism is the most suitable feature of contemporary international human rights law theory and practice to express this ideal.

## **5. Conclusion.**

This contribution attempted to explore arguments in favour of the autonomy of national minorities in adjudicating and implementing universal human rights standards as well as appraise some of the extant conceptual and doctrinal tools of international human rights law to achieve those aims. It concludes that there are valid

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<sup>104</sup> Stone-Sweet, ‘A Cosmopolitan Legal Order’, 53-90.

<sup>105</sup> *Ibid.* 61.

<sup>106</sup> N. Walker, ‘Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason’ (2011) 24 *Ratio Juris* 369–385, 378.

<sup>107</sup> Such as the explicit terms of the Scotland Act 1998 or Articles 32 and 46 ECHR on the jurisdiction of the Court to interpret the Convention and the duty of signatory states to abide by the decisions of the Court.

normative arguments for national minorities having some say in how universal human rights norms are ‘domesticated’ within their particular cultural and historical contexts distinct from the dominant culture of the metropole. Moreover, the tools of pluralism which is an increasingly popular trend in human rights law, is a particularly useful way of thinking about how that ideal might be achieved. If authority sites have been pluralised in a post-Westphalian world, whereby not only states can enjoy agency and authority as political and judicial actors, and in the human rights domain, such agency is contained within a common framework of fundamental rights values, then there is no conceptual barrier to national minorities participating in dialogues regarding the interpretation and implementation of universal human rights norms alongside both the metropolitan and supranational levels. Furthermore, if fundamental rights claims involve, at least in part, the shaping of political identity, then a liberal theory of national minorities along with their constitutional patriotism, provides strong normative reasons for the role of national minority (particularly judicial) institutions in engaging and participating in the joint enterprise of ‘promoting a joint European development of fundamental rights’<sup>108</sup> in a pluralistic relationship with the state and supranational level all captured within the framework of the values and principles which underpin the ECHR. The shared ‘glue’ of fundamental rights, combined with the evolution of the Westphalian paradigm to allow for unorthodox (from a Westphalian viewpoint) authority claims from unorthodox authority sites, therefore, allows for subnational minority institutions to engage and partake in the on-going articulation, definition and adjudication of the meaning of the common normative resources of human rights principles, adapted and tailored to the requirements of their own national minority status, thereby (re)defining their political identities.

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<sup>108</sup> German Federal Constitutional Court ‘Görgülü’ decision 14 October 2004, (2004) 2 BvR 1481/04, para. 62.

Whereas the political incident which provided the catalyst for this exploration may have been motivated by more strategic or party political reasons, what this chapter has argued is that one need not be completely cynical of the contentions of the Justice Secretary and First Minister and respond so quickly to the Lord Advocate's question in the affirmative. As a subnational minority jurisdiction, Scotland is justified in not sharing the same understanding of the meaning and requirements of human rights norms as their co-citizens in the rest of the United Kingdom; its children may lisp a particularly Scottish interpretation of the rights of man.